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NO. 80-5263

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1980

LISA BULLWINKLE,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT
OF CALIFORNA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I

Whether the interpretation of California Penal Code section 1412 and California Government Code section 26640 to allow for a booking search of the purse of a felony arrestee is constitutional under the Fourth and Fourteenth Amendments to the Constitution.

II

Whether a warrantless search of a purse of a felony arrestee, once the purse is in the exclusive control of law enforcement authorities, is constitutional under the Fourth and Fourteenth Amendments to the Constitution.

III

Whether appellant was deprived of due process of law under the Fourteenth Amendment by application of an inevitable discovery rule where there is no evidence that a later search would occur.

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LISA BULLWINKLE,

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v.

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Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Court of Appeal for the Second Appellate District of California on the ground that the issues raised in the appeal are so unsubstantial as not to require any further argument.

I

THE NATURE OF THE CASE

A. Proceedings Below

Appellant Lisa Bullwinkle was charged in an information filed by the District Attorney of Santa Barbara County with five counts of burglary, in violation of California Penal Code section 459, five counts of receiving stolen property, in violation of California Penal Code section 496, and two counts of issuing a check without sufficient funds, in violation of California Penal Code section 476(a). Following appellant's plea of not guilty, she unsuccessfully moved to suppress evidence seized from her purse and in her apartment pursuant to California Penal Code section 1538.5.

After denial of appellant's motion to suppress the evidence, she entered a plea of guilty to four counts

of receiving stolen property and was sentenced to state prison for a term of four years. The remaining counts were dismissed upon motion by the prosecution.

Appellant thereafter timely pursued an appeal to the Court of Appeal for the Second District of California for review of the denial of the motion to supress under California Penal Code section 1538.5(m). The judgment was affirmed on appeal in a decision filed April 24, 1980. Appellant's petition for rehearing was denied, and a petition for hearing was denied by the Supreme Court of California on July 23, 1980.

This appeal is taken from the judgment of the Court of Appeal for the Second Appellate District of California.

B. <u>The Facts Relating to the Motion to Suppress</u>

Santa Barbara Police Officers

Ira Watson and John Alpert went to an apartment in Santa Barbara on March 3, 1978, with arrest warrants for appellant Lisa Bullwinkle and her husband, codefendant Edward Bullwinkle, for writing checks without sufficient funds. The officers were admitted into the apartment and placed appellant and her husband under arrest in the living room. Appellant indicated a desire to go upstairs to change her clothes. Appellant went upstairs to a bedroom, and when Detective Watson heard a door close, he followed her upstairs. Detective Watson and codefendant Edward Bullwinkle joined appellant and Detective Alpert in the bedroom.

Detective Alpert asked appellant if she wished to take her purse, indicating a leather bag on the floor. Appellant said the bag was not a purse, but

instead was a camera case. Appellant picked up another bag, her purse, from the floor, and Detective Watson immediately seized it and handed it to Detective Alpert.

Detective Alpert looked in the purse for weapons before appellant and her husband were transported to the police station. Inside the purse he observed only checkbooks. Upon arriving at the police station, Detective Alpert emptied the contents of the purse on his desk, looking for evidence such as checks relating to the charged offense or other offenses.

As Detective Alpert examined the contents of the purse, Detective William Rogers passed by and noticed a photograph of codefendant Edward Bullwinkle, which he felt resembled an artist's drawing of a suspect in a burglary of a camera

store. Detective Rogers compared a list of camera serial numbers found in appellant's purse with items stolen in the burglary, and based upon this information, obtained a search warrant for the residence of appellant and her husband. Evidence discovered in that search led to the filing of the burglary and receiving stolen property charges.

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTIONS NOT PREVIOUSLY DECIDED BY THIS COURT

A. The Application of the California Booking Statutes

The decisions of this Court have steadfastly recognized the right of law enforcement officials to search personal property in the immediate possession of an arrestee either at the moment of arrest or later at the police station.

(Chimel v. California (1969) 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034; United States v. Edwards (1974) 415 U.S. 800, 804-805, 39 L.Ed.2d 771, 94 S.Ct. 1234; Abel v. United States (1960) 362 U.S. 217, 238-239, 4 L.Ed.2d 668, 80 S.Ct. 638.) The opinion of the Court below, and its interpretation of California law, is entirely consistent with the prior opinions of this Court. The appeal therefore fails to present a substantial question not previously considered by this Court.

The Court of Appeal below held that the search of appellant's purse was valid as an accelerated booking search. The reasoning supporting the accelerated booking search theory is that where it is shown that a suspect would have been jailed and subject to a booking search, the fact that a thorough search of the

booking type occurs prior to the actual booking process does not render the search illegal, since no additional or greater intrusion of the privacy of the suspect is involved. (People v. Bullwinkle (1980) 105 Cal.App.3d 82, 87, 164 Cal.Rptr. 163; People v. Barajas (1980) 81 Cal.App.3d 999, 1008-1009, 147 Cal.Rptr. 195; People v. Flores (1980) 100 Cal.App.3d 221, 229-230.) The Court reasoned that as a felony arrestee appellant would have been booked, and California Penal Code section 1412[1/] and

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1/ Penal Code section 1412 provides:

"When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the Clerk of the Court to which the

California Government Code section 26640[2/] mandate an accounting of property taken from her, including the contents of her purse. (People v. Bullwinkle, supra, 105 Cal.App.3d at p. 88.) It is the

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depositions and statement are to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the Clerk or other person in charge of the police office in such city or town."

2/ Government Code section 26640 provides:

"The sheriff shall take charge of, safely keep, and keep a correct account of, all money and valuables found on each prisoner when delivered at the county jail. Except when otherwise ordered by a court of competent jurisdiction, the sheriff shall pay such money or sums therefrom and deliver such valuables or portions thereof as the prisoner directs and shall pay and deliver all the remainder of his money and valuables to the prisoner or to his order upon his release from the jail or to his legal representative in case of his death or insanity."

interpretation and application of these two statutes which form the basis of the first question presented by appellant.

The interpretation of California Penal Code section 1412 and California Government Code section 26640, and their application to the search of appellant's purse, comport with the mandate of the Fourth and Fourteenth Amendments. In United States v. Edwards, supra, 415 U.S. at pages 802-809, the Court upheld a warrantless seizure and examination of the clothing of an arrestee on the morning after her arrest. Noting that the clothing could have been seized and searched at the moment of arrest, the Court held that delay in the seizure until after incarceration of the suspect did not negate its validity. (Id., at pp. 804-805.) Citing United States v. Caruso (2nd Cir. 1966) 358 F.2d 184,

certiorari denied, 385 U.S. 862, the Court stated in language relevant to the instant case as follows:

> "Caruso is typical of most cases in the courts of appeals that have long since concluded that once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. <u>This is true where the clothing or effects are immediately seized upon arrival at the jail, held</u>

under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration." (Emphasis added, fns. omitted, Id., at pp. 807-808.)

Edwards makes clear that the personal effects of an arrestee, including personal property held in his or her name following arrest, are subject to a reasonable warrantless search. One such reasonable warrantless search expressly recognized in Edwards, supra, at pages 804-805, footnote 6, is the "routine custom of permitting a jailer to search the person who is being processed for confinement under his custody and control." Indeed, "little doubt has ever

been expressed about the validity or reasonableness of searches incident to incarceration." (Ibid.) The clear language in Edwards indicates that the Court below construed California Penal Code section 1412 and California Government Code section 26640 in a constitutional fashion to allow for a booking search of appellant's purse. Because the purse would have been searched and inventoried incident to booking, there was no greater intrusion upon appellant's rights by application of an accelerated booking search theory. The items observed in the search by Detective Alpert would inevitably have been observed during the booking search mandated by statute.

Sound policies exist for warrantless booking searches of personal property which is to be held by the police during incarceration. The need to

prevent the introduction of contraband or weapons into the jail is readily apparent. The further need to protect and safeguard the property of an arrestee, particularly a purse in which items of value are often kept, makes it manifestly reasonable to routinely inventory the contents of such property. (People v. Gilliam (1974) 41 Cal.App.3d 181, 189, 116 Cal.Rptr. 317; cf. South Dakota v. Opperman (1976) 428 U.S. 364, 367-376, 49 L.Ed.2d 1000, 96 S.Ct. 3092.) Because booking searches are routine and manifestly reasonable, they may be conducted without a warrant without violation of the Fourth Amendment. (South Dakota v. Opperman, supra, at pp. 372-373.) The interpretation of the California booking statutes by the Court below was consistent with the Fourth Amendment and the appeal fails to present a substantial

federal question.

B. The Applicability of Chadwick and Sanders

Appellant argues that United States v. Chadwick (1977) 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476, and Arkansas v. Sanders (1979) 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586, prohibit the warrantless search of a "closed container" once it is in the exclusive custody of the police following an arrest. Appellant reasons that because Detective Alpert had exclusive control of appellant's purse, he was not entitled to search it without a warrant, and any justification to do so under California law was violative of the Fourth and Fourteenth Amendments. The answer to appellant's contention is found in the clear language of the Court in Chadwick, and accordingly the argument fails to

present a substantial federal question justifying further consideration by the Court.

In Chadwick, federal agents validly arrested suspects for transporting narcotics and seized a 200-pound double-locked footlocker, which was transported to a federal building, opened and searched without a warrant. In rejecting the argument that the search was valid as incident to arrest, the Court held as follows:

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property

is no longer an incident of the arrest." (Fn. omitted, United States v. Chadwick, supra, at p. 15.)

Under somewhat similar facts, the Court later ordered suppressed the contents of a suitcase seized from the trunk of a taxicab following a lawful arrest in Arkansas v. Sanders, supra, 442 U.S. at pages 761-766.

The key to the holding in Chadwick is that the rule set forth applies only to "luggage or other personal property not immediately associated with the person of the arrestee . . . ." (Emphasis added, Id., at p. 15.) The double-locked footlocker in Chadwick was not personal property immediately associated with the person of the arrestee and its search therefore was not incident to arrest. In contrast, appellant's purse was personal property immediately

associated with her person, and it could be seized and searched without a warrant incident to her arrest, including after it fell into the exclusive custody of the police under United States v. Edwards. Unlike a suitcase, a purse may be characterized as being imm diately associated with the person of the arrestee because it is carried with that person at all times. (United States v. Garcia (7th Cir. 1979) 605 F.2d 349, 365 (Swygert, J., dis., quoting from United States v. Berry (7th Cir. 1977) 560 F.2d 861, vacated 571 F.2d 2, cert. den., 439 U.S. 840 (1978).)

Controlling precedent to justify the search of appellant's purse is found in Abel v. United States, supra, 362 U.S. 217, which is far more similar on its facts to the instant case than is Chadwick. In Abel, the petitioner was

arrested in his hotel room by Immigration and Naturalization officers on an administrative warrant for deportation and was subsequently convicted of conspiracy to commit espionage. After his arrest, the petitioner in Abel packed certain belongings into a suitcase which was taken with petitioner to the Immigration and Naturalization Service headquarters, where it was searched. In upholding the warrantless search of the luggage at the government headquarters, this Court held as follows:

> "This search was a proper one. The property taken by petitioner to I. N. S. headquarters was all property which, under Harris, was subject to search at the place of arrest. We do not think it significantly different, when the accused decides to take the property with

him, for the search of it to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested. It is to be noted that this is not a case, like Kremen v. United States, 353 U.S. 346, where the entire contents of the place where the arrest was made were seized. Such a mass seizure is illegal. The Government here did not seize the contents of petitioner's hotel room. Petitioner took with him only what he wished. He chose to leave some things behind in his room, which he voluntarily relinquished. And items (3), (4), and (5) were

articles subject to seizure when found during a lawful search." (Abel v. United States, supra, 362 U.S. at p. 239.)

Appellant voluntarily elected to take her purse with her to the police station following her arrest. Under Abel, a search of the purse at the station was proper, since it could have reasonably been searched without a warrant at the scene of the arrest. (See United States v. Robinson (1973) 414 U.S. 218, 230-236, 38 L.Ed.2d 427, 94 S.Ct. 467.) The reasoning of Chadwick presents no substantive Fourth Amendment barrier to the search of items of property closely associated with the person of the arrestee at the time of arrest, after transportation to the police station, or at booking.

In any event, the search of

appellant's purse need not turn on the distinctions between Chadwick, Edwards and Abel, because the purse had already been properly examined for weapons by Detective Alpert before appellant was transported to the police station. Detective Alpert was clearly entitled to examine the purse for weapons before transporting appellant to the station. (See United States v. Edwards, supra, 415 U.S. at p. 805; United States v. Robinson, supra, 414 U.S. at p. 234; Chimel v. California, supra, 395 U.S. 752, 763, 23 L.Ed.2d 685, 89 S.Ct. 2034.) Indeed, it would have been foolhardy for the officer not to examine the purse for weapons prior to transporting the arrestee.

When Detective Alpert examined the purse for weapons, he observed numerous checkbooks, which could reasonably be

inferred to be evidence of the charged crimes, since appellant was arrested upon a warrant for issuing non-sufficient fund checks. "Having in the course of a lawful search" for weapons come upon the checkbooks in the purse, Detective Alpert was not required to get a warrant at the station to search for the items he had already observed in the purse. (United States v. Robinson, supra, 414 U.S. at p. 236; see also Harris v. United States (1947) 331 U.S. 145, 154-155, 91 L.Ed. 1399, 67 S.Ct. 1098; Adams v. Williams (1972) 407 U.S. 143, 148-149, 32 L.Ed.2d 612, 92 S.Ct. 1921.) Because Detective Alpert was authorized to look into the purse for weapons by decisions of this Court, the later warrantless search was lawful, and tne issue of the propriety of the search fails to present a substantial federal question.

C. The Alleged Due Process Violation

The third question presented by appellant focuses on an alleged violation of due process resulting from an asserted factual finding by the California Court of Appeal that appellant's purse would have inevitably been searched incident to booking. Appellant cites Jackson v. Virginia (1979) 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, and reasons that because there was no substantial evidence to prove the purse would have been searched incident to booking, the finding that such a search was inevitable violates due process. Because the issue of whether the purse would have been searched is one of state law, the final question raised by appellant fails to present a substantial federal issue.

Under California law, there can

be no dispute but that the purse of a felony arrestee will be searched as part of the booking process. (People v. Brown (1979) 88 Cal.App.3d 283, 151 Cal.Rptr. 749; People v. Rhodes (1972) 23 Cal.App. 3d 257, 258-261, 100 Cal.Rptr. 487; People v. Blatt (1972) 23 Cal.App.3d 148, 151-153, 99 Cal.Rptr. 855.) It has been held to be impermissible speculation to argue that a booking search of a felony arrestee will not occur in California. (People v. Barajas, supra, 81 Cal.App.3d at p. 1010.) Because it is settled as a matter of law in California that booking searches follow felony arrests, and such searches include an inventory of purses, application of an inevitable discovery rule was clearly proper because "such procedures are clearly predictable rather than open to speculation." (Novikoff, The Inevitable Discovery Exception to the

Constitutional Exclusionary Rule, 74 Cal.L.Rev. 88, 91.) It is clear from California case law that appellant's purse would have been searched and the evidence "would probably have been discovered even had the claimed illegality not occurred." (People v. Superior Court (Tunch) (1978) 80 Cal.App.3d 665, 682, 145 Cal.Rptr. 795.)

As noted above, the crucial inquiry in any Fourth Amendment discussion is the reasonableness of the search. (South Dakota v. Opperman, supra, 428 U.S. at pp. 372-373.) That determination may depend upon a factual showing of justification, such as articulable facts justifying a detention as in Terry v. Ohio (1968) 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868, or it may simply turn on an assessment of the realities of a given situation, as exemplified by

United States v. Robinson, supra, 414 U.S. at page 234. If a search is reasonable as a matter of law in a particular circumstance, no factual showing is necessary. For example, in United States v. Robinson, supra, at pages 234-235, the Court upheld the search of a person incident to arrest based on the general need to disarm the suspect and preserve evidence, without requiring litigation in each case to justify the search. The warrantless search in Robinson was reasonable as a matter of law.

Consistent with the approach in Robinson, the California Court of Appeal below found as a matter of law that felony booking would take place and appellant's purse would be subject to a booking search. The conclusion of the Court was clearly a correct

interpretation of a consistent line of California authorities. Because the search of the purse was going to take place as a matter of law during booking, and because a booking search would be reasonable under Edwards, Abel and numerous California authorities, there was no denial of due process in upholding the search even in the absence of testimony that the search would in fact occur.

Moreover, appellant's reliance on Jackson v. Virginia, supra, 443 U.S. 307, for support of her argument that she was denied due process of law by the absence of factual evidence to show that the purse would have been searched, is totally misplaced. In Jackson, supra, at pages 316-320, the Court held that in federal habeas corpus proceedings reviewing the sufficiency of the evidence in state court convictions, due process

requires evidence which could lead any rational trier of fact to find the elements of the charged offense beyond a reasonable doubt. (See In re Winship (1970) 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068.) Jackson is limited in its holding to review of the sufficiency of evidence to support a conviction, and it is wholly inapplicable to review of search and seizure issues which do not require proof beyond a reasonable doubt. (United States v. Matlock (1974) 415 U.S. 164, 177-178, fn. 14, 39 L.Ed.2d 242, 94 S.Ct. 988.) Appellant's attempt to bootstrap a due process violation under Jackson into the review of a search and seizure issue should be summarily rejected as failing to present a substantial federal question.

III

CONCLUSION

For the foregoing reasons, appellee submits that the questions upon which this case depend are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss the appeal, or in the alternative, to affirm the judgment of the Court of Appeal for the Second Appellate District of California.

Respectfully submitted,

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